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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RONALD HAGEL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Ronald Hagel, defendant-appellant in the court below, petitions this Court to issue its writ of certiorari to review the judgment of the Supreme Court of Illinois entered in *People of the State of Illinois,* appellee, v. *Ronald Hagel,* appellant, No. 38612, on March 18, 1965, rehearing denied, May 19, 1965, which affirmed the judgment of the Circuit Court of Peoria County, Illinois, entered April 9, 1964.

Opinion Below

The opinion of the Supreme Court of Illinois, reported at 32 Ill. 2d 413, 206 N.E. 2d 699, is appended as Appendix A. The Circuit Court of Peoria County, Illinois, did not render an opinion in the cause.

Jurisdictional Statement

The opinion and judgment of the Supreme Court of Illinois, affirming the judgment of the Circuit Court of Peoria County, Illinois, were filed and entered March 18, 1965. (Rec. 5-7; Appendix A.) Petitioner's timely petition for rehearing (Rec. 8-9) was denied May 19, 1965. (Rec. 10.) On July 26, 1965 Mr. Justice Stewart extended the time to and including September 20, 1965 within which this petition could be filed with the Clerk of this Court. This petition is timely filed pursuant to that order.

This Court has jurisdiction to review the judgment of the Supreme Court of Illinois by writ of certiorari under the provisions of 28 U.S.C. § 1257 (3).

Question Presented

Was petitioner's constitutional right not to be "compelled in any criminal case to be a witness against himself", guaranteed him by Amendment V, and Section 1 of Amendment XIV to the Constitution of the United States, infringed by newspaper, radio and television comment upon his failure to testify which was communicated to the jury before it began its deliberations?

Constitutional Provisions Involved

This case involves the "Self Incrimination" Clause of Amendment V and the Due Process Clause of Amend-

ment XIV to the Constitution of the United States which provide, in material part:

Amendment V

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Amendment XIV

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

A STATEMENT OF THE CASE

Petitioner was indicted by the grand jury of Peoria County, Illinois, for embezzling $460 as a public officer, (A. 1.)* The charge involved traffic fines allegedly paid to petitioner, a Justice of the Peace, by persons he had found guilty of state traffic violations. Petitioner was obliged to pay these fines to the Treasurer of Peoria County and the prosecution averred that he had wilfully failed to do so. He was found guilty by a jury and sentenced to three to five years in the Illinois State Penitentiary. (A. 13.)

Extensive, adverse newspaper, radio and television publicity attended petitioner's indictment and trial. It is summarized in Volume 2 of the printed abstract of record. (Rec. 4.) All of the media commented specifically upon petitioner's failure to testify. Defendant's motion for a new trial (A. 5-10; Rec. 3) alleged that the rights guaranteed him by the due process clause of Amendment XIV

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* References "A. ....." are to the printed abstract of record filed with the Supreme Court of Illinois in two volumes, Volume I of which is at page 3 of the record in this Court and Volume II of which is at page 4 of the record in this Court, and nine printed copies of which have been filed with this Court under its Rule 21(4).

to the United States Constitution were infringed by the prejudicial newspaper, radio and television publicity which attended his prosecution and trial. The motion was denied. (A. 12-13.)

Petitioner appealed to the Supreme Court of Illinois asserting that the extensive adverse newspaper, radio and television publicity—and particularly the comments upon his failure to testify—had infringed the rights guaranteed him by the due process clause of Amendment XIV of the Constitution of the United States.

The Supreme Court of Illinois affirmed, observing that "the publicity during the trial . . . did comment upon defendant's failure to testify." (Rec. 7.) That court held, however, that petitioner could not be heard to complain of the pre-trial publicity because he had not petitioned for a change of venue and he could not complain of the comments on his failure to testify, made during the trial, because he had not requested that the jury be sequestered or moved for a mistrial. (Rec. 7.)*

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* The Supreme Court of Illinois did not hold that the adverse publicity—and particularly the comments upon petitioner's failure to testify—had not reached the jury. Under the decisions of this Court (*Rideau* v. *Louisiana*, 373 U.S. 723 [1963]) and those of the Illinois Supreme Court, (*People* v. *Murawski*, 394 Ill. 236 [1946]) communication is presumed.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment privilege against self-incrimination is fully applicable to the States through the Fourteenth Amendment. It is "to be enforced against the States . . . according to the same standards that protect . . . [it] against federal encroachment" guaranteeing "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will . . .". *Malloy* v. *Hogan,* 378 U.S. 1, at pp. 8, 10 (1964).

In federal criminal cases the defendant has the unbridled privilege to refrain from testifying, and comment thereon by the court, prosecutor or co-defendant is *per se* reversible error as an infringement of the privilege. *De Luna* v. *United States,* 5 Cir., 308 F. 2d 140, rehearing denied, 324 F. 2d 375 (1963); *Malloy* v. *Hogan,* 378 U.S. 1, fn. 1 (1964). And newspaper comment upon the defendant's failure to testify, when communicated to the jury, has been similarly regarded. *United States* v. *Ogden,* D. Pa., 105 Fed. 371 (1900).

Surely *Twining* v. *New Jersey,* 211 U.S. 78 (1908) and *Adamson* v. *California,* 332 U.S. 46 (1947), condoning, respectively, a state trial court's and a state prosecutor's comment upon a defendant's failure to testify have been overruled by *Malloy.* The question is presented by this record whether, in a state criminal trial, newspaper, radio and television comment on the defendant's failure to testify—communicated to the jury before it began its deliberations—constitutes an infringement of the defendant's Fifth and Fourteenth Amendment rights to remain silent. Compare, *U.S.* v. *Ogden, supra.*

This is a federal constitutional question of substance which has not heretofore been, but should be, determined by this Court. Rule 19 (1)(a), Rules of the Supreme Court of the United States.

CONCLUSION

For the reasons stated, petitioner respectfully prays the issuance of this Court's writ of certiorari to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

(No. 38612.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *v.* RONALD HAGEL, Appellant.

Opinion filed March 18, 1965—*Rehearing denied May* 19, 1965.

APPEAL from the Circuit Court of Peoria County, the Hon. HOWARD E. WHITE, Judge, presiding.

PRENTICE H. MARSHALL and GEORGE J. COTSIRILOS, of Chicago, for appellant.

WILLIAM G. CLARK, Attorney General, of Springfield, and JAMES V. CUNNINGHAM, State's Attorney, of Peoria, (FRED LEACH and GEORGE W. KENNEY, Assistant Attorneys General, and JAY H. JANSSEN, Assistant State's Attorney, of counsel), for the People.

Mr. JUSTICE HOUSE delivered the opinion of the court:

Defendant, Ronald Hagel, was found guilty by a jury in the circuit court of Peoria County of embezzling $460 as a public officer and was sentenced to the penitentiary for a term of 3 to 5 years. He appeals from this judgment of conviction.

Defendant was a justice of the peace of Peoria County from 1957 to 1961. Tickets issued to traffic violators and returnable before defendant and his receipt books were introduced into evidence over his objection. They showed that he had received more than $4000, representing fines and costs collected from traffic violators from May 1, 1959, through April 30, 1961. It is undisputed that he failed to account for any fines or costs collected during that period.

Defendant's first contention, and the one which gives us jurisdiction of this case, is that extensive prejudicial newspaper, radio and television publicity deprived him of his right to a fair trial guaranteed by the Illinois and Federal constitutions. With regard to the pretrial publicity, he states that his case was a newsworthy "coming event"; that details of his alleged embezzlement were reported in the press and that the press constantly connected him with Carl Fry, a former justice of the peace who had been indicted, tried and convicted of embezzlement. The gist of this assertion is that the press had created a prejudicial atmosphere within the the community from which an impartial jury could not be obtained.

While our law does not permit the courts to bridle the press, it does provide protection from pretrial publicity. Through changes of venue and continuances the trial can be moved to a less prejudicial place and time. *Voir dire* examination can be used to expose prejudice. Here defendant made no motion for a change of venue or continuance and the record fails to show the *voir dire* examination of any of the jurors. The two cases cited by defendant wherein the Supreme Court reversed convictions because of prejudicial pretrial publicity (*Rideau* v. *Louisiana,* 373 U.S. 723, 10 L. ed. 2d 663, and *Irvin* v. *Dowd,* 366 U.S. 717, 6 L. ed. 2d 751) both involved denials of motions for a change of venue. We feel that a defendant represented by counsel of his choice cannot, after his conviction, complain of the effect that pretrial publicity may have had on the jury when he failed to move for a change of venue or continuance or to preserve the *voir dire* examination.

The publicity during the trial was essentially factual, but it did comment on defendant's failure to testify. As we pointed out in *People* v. *Brinn,* Nos. 36928, 36962, one solu-

tion to the problem of exposing the jurors to publicity being given the trial is to completely seclude the jury. No request for seclusion of the jury was made in this case nor did defendant ever make a motion for a mistrial. The trial judge without request admonished the jury against reading about or discussing the case and gave defendant's only requested instruction on outside influences. On this state of the record we hold that the trial court did not err in refusing to grant a new trial because of publicity given to the trial.

Defendant argues that the court erred in admitting over his objection a written demand for the funds made by the State's Attorney upon him prior to commencement of the prosecution. The trial court admonished the jury that the exhibit was admitted only to show that a demand was made upon defendant and not for the purpose of proving that defendant had withheld funds belonging to the county. Defendant asserts, however, that since a demand is not an element of the crime of embezzlement, the exhibit was inadmissible. A demand is not an essential element of the crime with which defendant was charged. (*People* v. *Davis,* 269 Ill. 256.) The demand here stated no amount due and referred only to the period covered by the indictment. It could not therefore have prejudiced the defendant.

Defendant's final objections center around the admission of a large number of State troopers' written disposition reports, receipts from defendant's receipt books and the accountant's summary sheets based on the disposition reports and receipts. He admits that there was sufficient foundation to support the admission of exhibits showing that he had received $90 but that there was no proper foundation for the admission of exhibits showing he re-

ceived over $4000. Although he concedes that proof that he withheld $90 would support the conviction and make evidence of further sums withheld merely cumulative and immaterial, he argues that there is evidence which tends to prove he made payment of $807.

The only witness called by defendant was John Rellihan who testified that the Central National Bank and Trust Company of Peoria had issued a cashier's check to defendant dated September 3, 1958, in the amount of $807 payable to the county treasurer. This check was issued before the period in question and could not have covered the $90 withheld by defendant. Furthermore, there was no proof that the check was ever delivered to the county treasurer.

The judgment of the circut court of Peoria County is affirmed.

Judgment affirmed.